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TO UNKNOWN MALE: NOTICE OF PLAN FOR ADOPTION IN THE FLORIDA 2001 ADOPTION ACT

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INTRODUCTION

Jeff and Lisa had a long-term relationship that ended badly.[1] Lisa was pregnant with Jeff's child when they broke up. Jeff was unaware that he had fathered a child until he heard from a mutual friend that Lisa had given birth and had identified a loving couple to adopt the child. Jeff contacted a lawyer to assert his parental rights as soon as he heard Lisa was placing their child up for adoption.

The Joneses had been hoping to adopt a child for many years and were excited to meet Lisa through a private adoption agency. State law requires consent for the adoption from the mother and any man identified by the mother as the child's biological father. Lisa, however, lied to the adoption agency, telling them that she did not know the identity of the baby's father, and gave her consent for the Joneses to adopt her child. The adoption proceeded normally—without Jeff's consent. A day after the baby was born, the Joneses took their newborn home. Several months after initiating the adoption proceedings, however, Lisa and the Joneses were informed that Jeff was contesting the adoption in court.

After years of court battles, the state supreme court finalized the adoption. Although Lisa hid her pregnancy from Jeff, the court held

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1 This is a hypothetical situation based on actual contested adoption cases and was not intended to describe an actual event. *See, e.g.*, *In re* Kirchner, 649 N.E.2d 324, 326–27 (Ill. 1995) (describing adoption proceedings where the biological mother told the biological father their baby had died so she could place the child for adoption without the father's consent); *In re* B.G.C., 496 N.W.2d 239, 241 (Iowa 1992) (describing adoption where the biological mother intentionally misidentified the biological father when placing child for adoption).

that Jeff did not have any parental rights to his child because he had not provided financial or emotional support to Lisa or his child following the child's conception. Years after the adoption proceedings were initiated, the respective rights of the parties were finally defined. Jeff invested emotionally and financially only to discover that he had no legally recognized rights in his child, while the Joneses faced each court battle fearing it could mean the end of their relationship with the child they had loved and cared for since the child's birth.

Cases like this are rare; however, they highlight an unsettling uncertainty in the permanency of adoptions that may discourage couples and individuals from seeking adoption.[2]

The real life contested adoption of Florida's Baby Emily mobilized interest and support in the state legislature for changes to Florida's adoption law, aimed at defining the biological parents' rights earlier in the adoption process.[3] In March 2001, the Florida Legislature amended the state's adoption law.[4] The law expanded the notice requirement for mothers seeking private adoptions to require notice to the biological father even when the mother is unsure of his identity and location.[5]

This Note examines the constitutionality of Florida's 2001 Adoption Act in light of the Supreme Court's compelled speech doctrine as articulated in *Riley v. National Federation of the Blind*.[6] Part I analyzes the development of the Florida 2001 Adoption Act and its notice requirements. Part II examines the constitutional basis of the putative father's parental rights. Part III analyzes the constitutionality of the 2001 Adoption Act in light of the Supreme Court's compelled speech decisions under the First and Fourteenth Amendments to the U.S. Constitution. Part IV discusses the policy implications of the 2001 Adoption Act and recognizes a less intrusive means to achieve the Florida Legislature's goal of clarifying the putative father's rights earlier in the adoption process. This Note concludes that the 2001 Adop-

2 Scott A. Resnik, *Seeking the Wisdom of Solomon, Defining the Rights of Unwed Fathers in Newborn Adoptions*, 20 SETON HALL LEGIS. J. 363, 365 (1996).

3 *Id.* at 379–80. The Senate Staff Analysis of the Florida Adoption Law states that "the cumulative effect of the bill is to provide uniformity, continuity, clarification, and finality regarding proceedings for termination of parental rights and proceedings for adoption." FLA. SENATE COMM. ON THE JUDICIARY, 2001 CS/SB 138: SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT 2 [hereinafter SENATE STAFF ANALYSIS].

4 2001 Fla. Sess. Law Serv. 2001-3 (West).

5 The bill was first introduced shortly after the Supreme Court's decision in the Baby Emily case, G.W.B. v. J.S.W. (*In re* the Adoption of E.A.W.), 658 So. 2d 961 (Fla. 1995). *See* Kari Barlow, *Adoption Statute has Families Feeling Punished*, BRADENTON HERALD, Sept. 29, 2002, at 8.

6 487 U.S. 781 (1988).

tion Act is unconstitutional pursuant to the compelled speech doctrine.

I. FLORIDA'S NOTIFICATION REQUIREMENTS

The Supreme Court has recognized some constitutionally protected rights for men in their illegitimate children under the Fourteenth Amendment;[7] however, the Court's decisions have left states without clear guidance about when a putative father's right to participate in decisions regarding his out-of-wedlock child is constitutionally guaranteed. Cases concerning children referred to in the media as Baby Jessica, Baby Richard, and Florida's Baby Emily highlighted the lack of workable legal or constitutional definitions of unmarried paternal rights to an unborn or newborn child.[8] Putative fathers interested in raising their illegitimate children have no direction about when their parental rights are recognized in the law and what steps they need to take in order to exercise their rights. This uncertainty

7 *See* Michael H. v. Gerard D., 491 U.S. 110 (1989) (holding that a biological father's constitutional rights were not violated by a California law that recognizes the biological mother's husband as the child's legal father); Lehr v. Robertson, 463 U.S. 248 (1983) (holding that constitutionally protected rights for unwed fathers only exist when the father has significantly participated in his child's upbringing); Caban v. Mohammed, 441 U.S. 380 (1979) (holding unconstitutional under the Equal Protection Clause of the Fourteenth Amendment a New York law that denied an unwed father who substantially participated in his children's upbringing the opportunity to contest adoption proceedings); Stanley v. Illinois, 405 U.S. 645 (1972) (holding that the Fourteenth Amendment requires that a biological father be provided due process before his illegitimate children can be removed from his custody).

8 During the late 1980s and early 1990s, three cases of putative fathers contesting infant adoptions caught the media's attention. They involved children identified in the press as Baby Emily, Baby Jessica, and Baby Richard. *See In re* Kirchner, 649 N.E.2d 324 (Ill. 1995) (Baby Richard); G.W.B. v. J.S.W. (*In re* Adoption of E.A.W.), 658 So. 2d 961 (Fla. 1995) (Baby Emily); *In re* Clauson, 501 N.W.2d 193 (Mich. Ct. App. 1993) (Baby Jessica). Although the cases resulted in different custody awards by the courts, they are similar in that they illuminate the shortcomings in the way state adoption laws addressed putative fathers' rights. *See generally* Resnik, *supra* note 2, at 366–80. In Baby Jessica's case, for example, after a high-profile, two-and-a-half year custody battle, Baby Jessica was taken from her adoptive parents' home and placed in the custody of her biological father, whom Jessica had never met. *See* Sarah K.L. Chow, Johnson v. Rodrigues (Orozco): *An Analysis of the Constitutionality of Utah's Adoption Statutes*, 2001 BYU L. REV. 349, 350–51. In contrast, Baby Emily was allowed to remain with her adoptive parents after a three-year custody battle initiated by her biological father. For a discussion of the Baby Emily case, see *supra* notes 104–15 and accompanying text.

prompted several states, including Florida, to amend their adoption laws.[9]

The 2001 Adoption Act, implemented in Florida in October 2001, required the mother to provide notice of the pending adoption to the biological father.[10] Constructive notice to the biological father was mandated when his identity and current location were unknown to the mother.[11] The pregnant woman or the adoption agency was required to place an ad in a newspaper in every county where conception could have occurred.[12] The law specifically required that certain information be included in the notice:

> The notice . . . must contain a physical description, including, but not limited to age, race, hair and eye color, and approximate height and weight of the minor's mother and of any person the mother reasonably believes may be the father; the minor's date of birth; and any date and city, including the county and state in which the city is located, in which conception may have occurred.[13]

The ad had to run once a week for a month and the pregnant woman or the prospective adoptive parents were forced to bear the ad's full cost, potentially several thousand dollars.[14] If the putative

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9 *See* Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1032 (2002) ("In the wake of Baby Jessica, state legislatures, in an attempt to avert such disrupted adoptions, [like Babies Emily, Jessica, and Richard] enacted putative father registries designed to mandate notice of adoptions to unwed fathers . . . ."); Chow, *supra* note 8 *passim* (discussing proposed changes to Utah law that address the problems that occur in adoption proceeding due to the legal uncertainty regarding putative fathers' rights).

10 FLA. STAT. ANN. § 63.088 (West Supp. 2003).

11 *Id.* § 63.088(5) (West Supp. 2003). Prior to the 2001 Adoption Act, Florida law required notice only when the when the father's location or identity were known. The impact of the 2001 law is to extend notice to all biological fathers, even those who cannot be identified. *See* SENATE STAFF ANALYSIS, *supra* note 3, at 6.

12 FLA. STAT. ANN. § 63.088(5) (West Supp. 2003).

13 *Id.* A typical ad published under the Florida Adoption Act says:

> To unknown male: notice of plan for adoption. Mother, [mother's name], 33, is Caucasian with brown hair, brown eyes, 5ft 2in tall, weighs approximately 142lb, has fair skin and average build. Baby [baby's name], born May 23, 2002, was conceived sometime in August 2001 in Miami or Orlando. Father, unknown male, is Caucasian, approximately 30–35 years old, approximately 6ft tall, fair skin, blond, straight hair, medium build.

Kate Hilpern, *Indecent Exposure*, GUARDIAN, Sept. 16, 2002, at P8.

14 Barlow, *supra* note 5 (estimating that the ads will increase the cost of adoptions between $3300 and $8900); *see also* Molly McDonough, *Adoption Law Challenged in Florida*, ABA J. E-REP., Aug. 23, 2002 (on file with author) ("The notice requirement also could inflate costs by requiring all the information in the petition to appear in the ad. . . . [T]hey can run as much as $3000 . . . . [placing] ads in other counties . . . where the birth father could be, and the total costs of a proceeding can double . . . .").

father failed to come forward, his parental rights were severed and the adoption proceeded.[15]

The law generated instant criticism from private adoption agencies, adoptive parents, women's organizations, and both pro-life and pro-choice groups.[16] Charlotte Dancui, a Florida adoption attorney, sued in the Palm Beach County Circuit Court to challenge the validity of the law as applied under the state constitution's privacy clause.[17] The Florida Constitution's protection of an individual's right to privacy provides that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private

15 FLA. STAT. ANN. § 63.089(2)(b)(2) (West Supp. 2003) (permitting the parental termination proceeding to begin sixty days from the first publication date of the constructive notice required in the 2001 Adoption Act). Under Florida's statute of limitations, a man who wishes to challenge the termination of his parental rights has one year from the court's entry of judgment terminating his rights to challenge the court's decision on the grounds of duress. *See* FLA. STAT. ANN. § 63.182 (West 1997 & Supp. 2004). He has two years from the court's entry of judgment to challenge the decision based on fraud. *See id.*; *see also* SENATE STAFF ANALYSIS, *supra* note 3, at 12.

16 *See generally* Elizabeth Amon, *Fla. Adoption Ads Pit Dads' Rights, Moms' Privacy*, FULTON DAILY NEWS, Sept. 6, 2002, at 1 (describing the lawsuit challenging the 2001 Adoption Act under the Florida Constitution); Barlow, *supra* note 5 (presenting potential adoptive parents' and adoption lawyers' criticisms of the 2001 Adoption Act); Rick Barry, *Brand the Young Mothers, End Adoptions*, TAMPA TRIB., Aug. 18, 2002, at F15 (characterizing the law as the "Hester Pryne Women's Humiliation Act"); Christina Cheakalos, *Scarlet Want Ads*, PEOPLE, Sept. 23, 2002, at 217 (discussing one potential adoptive family's opposition to the 2001 Adoption Act); Jon-Thor Dahlburg, *A 'Scarlet Letter' is the Law in Florida*, PHILADELPHIA INQ., Sept. 29, 2002, at A13 (describing the various criticisms of the 2001 Adoption Act); Hilpern, *supra* note 13 (describing the law as having "a sinister effect on women"); McDonough, *supra* note 14 (discussing Florida adoption lawyers' opposition to the 2001 Adoption Act); Katha Pollitt, *Slut Patrol*, NATION, Sept. 30, 2002, at 10 (criticizing the 2001 Adoption Act for penalizing women for having sex); Basu Rekha, *Iowa, Florida Shows Contempt for Women's Privacy Rights*, DES MOINES REG., Sept. 8, 2002, at 20 (characterizing the 2001 Adoption Act as an infringement on women's privacy rights); Bonnie H. Woods, *Fla. Law Infringes on Women's Privacy*, ATL. J. CONST., Oct. 4, 2002, at A21 (criticizing the 2001 Adoption Act for violating women's privacy); Cathy Young, *Men's Rights at Women's Expense?*, BOST. GLOBE, Sept. 9, 2002, at A15 ("[The Florida Adoption Act] has been described as barbaric and misogynistic. An overseas commentator . . . compared it to the infamous decree of an Islamic court in Nigeria sentencing a young woman to death by stoning for bearing a child out of wedlock."); Steven Ertelt, *Florida Adoption Law Drives Women to Have Abortions, at* http://www.priestsforlife.org/news/infonet02-08-27.htm (Aug. 26, 2002) (on file with author) (reporting that pro-life and pro-choice groups have united in opposition to the 2001 Adoption Act).

17 The trial court decision is unpublished. For a description of the case and its holding, see Laura Hodes, *FindLaw Forum: Florida's Law on Single Mothers, Adoption and Sexual Histories, at* http://www.cnn.com/2002/LAW/08/columns/fl.hodes.sexhistory (Aug. 29, 2002) (on file with author).

life . . . ."[18] Florida's Supreme Court construed the state constitution's right to privacy as protecting "the individual['s] interest in avoiding disclosure of personal matters,"[19] and "the interest in independence in making certain kinds of important decisions"[20] against government intrusion. The 2001 Adoption Act implicated both types of protected privacy interests by requiring disclosure of past sexual partners and, consequently, placing a burden on women's childbearing and child-rearing decisions.

Of the six plaintiffs, one was fourteen years old, one had been impregnated after receiving a date rape drug, and one was impregnated while exchanging sex for drugs.[21] The Palm Beach County Court upheld the law except as applied to victims of rape.[22] The court found that although the notice requirement violated a pregnant woman's "reasonable expectation of privacy,"[23] the state has a compelling interest in ensuring the biological father has a voice in the adoption proceedings—except in rape cases.[24]

The plaintiffs appealed the trial court's decision. In April 2003, the Florida District Court of Appeals for the Fourth District reversed and held that the notice provision in the 2001 Adoption Act violated the Florida Constitution's privacy guarantee.[25] The opinion did not discuss the contours of the state constitution's right to privacy or previous cases that might have supported its holding. According to the court, the invasion of the right to privacy is "so patent in this instance as to not require our analysis of cases interpreting this constitutional provision."[26] Interestingly, the state did not participate in the case to defend the law,[27] probably because the state legislature was poised to repeal the 2001 Adoption Act's notice requirements.

Just days after the court of appeals decision, the Florida State Senate passed House Bill 835,[28] eliminating the 2001 Adoption Act's ex-

18 FLA. CONST. art. I, § 23.

19 Rasmussen v. Fla. Blood Serv. Inc., 500 So. 2d 533, 535 (Fla. 1987), *quoted in* G.P. v. State, 842 So. 2d 1059, 1062 (Fla. Dist. Ct. App. 2003).

20 *Id.*

21 *See* Barry, *supra* note 16.

22 Hodes, *supra* note 17.

23 This standard is applied in privacy cases brought under the Florida Constitution. *See* SENATE STAFF ANALYSIS, *supra* note 3, at 19–20.

24 Hodes, *supra* note 17.

25 G.P. v. State, 842 So. 2d 1059, 1061 (Fla. Dist. Ct. App. 2003).

26 *Id.* at 1062.

27 *Id.* at 1060.

28 H.R. 835, 2003 Leg., Reg. Sess. (Fla. 2003); *see* Linda Kleindienst, *Senate Repeals Florida's 'Scarlet Letter' Law*, S. FLA. SUN-SENTINEL, Aug. 29, 2003, at 5B.

tensive notification requirement[29] and replacing it with a putative father registry.[30] A putative father registry is a database, maintained by the state, of men interested in asserting parental rights for any of his children born out of wedlock.[31] Men who wish to be notified of adoption proceedings involving their illegitimate child voluntarily add their name to the registry.[32] Under Florida's new law, putative fathers who fail to register with Florida's registry waive their right to notice of judicial proceedings involving their newborn children's adoption and an unregistered putative father's consent to the adoption is not required.[33] Putative father registries provide a mechanism for states to identify the biological father in order to facilitate the exercise or timely termination of parental rights.[34]

Although Florida repealed the 2001 Adoption Act, other states have expressed interest in notice requirements like those enacted in Florida and Congress may consider federal legislation imposing a detailed notice requirement similar to the 2001 Florida law.[35] As the Florida appeals court decision rested entirely on the state constitution, it is not a barrier to the passage of similar laws in other states or by the federal government.

II. PUTATIVE FATHERS' RIGHTS

Historically, putative fathers were not afforded any legal rights in their illegitimate children.[36] If a woman was married, the law recognized her husband as the biological father of her children, regardless

29 *See supra* notes 11–16 and accompanying text for a description of the notification provision.

30 FLA. STAT. ANN. § 63.054 (West Supp. 2004) (creating a putative father registry).

31 *See* Jeanette Mills, Comment, *Unwed Birthfathers and Infant Adoption: Balancing a Father's Rights with the States Need for a Timely Adoption Process*, 62 LA. L. REV 615, 633–35 (2002).

32 *Id.*

33 Adoption Act of 2003, Fla. Sess. Law Serv. 2003-58, § 11 (West) (providing that in newborn adoptions—adoptions of children six months old or younger—putative fathers who fail to sign up with the putative father registry waive their right to notice or consent to the adoption of their child).

34 *See* Resnik, *supra* note 2, at 425–26.

35 *See* Kisha Wilson, *Brigham Young U.: Utah Considers Bill to Force Pregnant Women to Reveal Fathers*, U-WIRE, MAR. 11, 2003, 2003 WL 14060354; *see also* Woods, *supra* note 16 ("Supporters of the 'scarlet letter' law are hoping to get similar laws passed in other states."). Although states have expressed interest in adopting statues like the 2001 Adoption Act, at the time of printing no legislation has been introduced.

36 *See* Karen R. Thompson, *The Putative Father's Right to Notice of Adoption Proceedings: Has Georgia Finally Solved the Adoption Equation?*, 47 EMORY L.J. 1475, 1477–78 (1998) (stating that "[h]istorically, a putative father had no rights in the adoption

of evidence to the contrary.[37] The advent of DNA paternity testing in the twentieth century made changes to the way law treats unmarried fathers inevitable.[38] DNA testing can be 99.9% accurate in determining paternity;[39] therefore, society need not depend on marital status to establish parentage. Consequently, the law has begun to recognize the parental rights of unwed fathers.[40] The Supreme Court, in a series of cases that began with *Stanley v. Illinois*,[41] has recognized that the Fourteenth Amendment to the U.S. Constitution protects some putative fathers' parental rights.[42] The Supreme Court's decisions, however, have left states with many unanswered questions regarding the scope and nature of biological fathers' rights in their illegitimate children.

In contrast, the legal status of a woman in relation to her children, born or unborn, has been squarely addressed on several occasions by the Supreme Court. In colonial America, unmarried parents did not have legally recognized rights in their illegitimate child; illegit-

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context until he legitimated his child" and that the mother was the only person identified by law as an illegitimate child's parent).

37 *See* Michael H. v. Gerard D., 491 U.S. 110, 124 (1989) (pointing out that traditionally there was a strong presumption of legitimacy that could only be rebutted by proof that the husband was incapable of impregnating his wife). The California law at issue in the *Michael H.* case provides a good example of the preferential treatment historically afforded to husbands in establishing paternity. *See infra* notes 87–95 and accompanying text; *see also* Edward R. Armstrong, *Family Law—Putative and the Presumption of Legitimacy*—Adams *and the Forbidden Fruit: Clashes Between the Presumption of Legitimacy and the Rights of Putative Fathers in Arkansas*, 25 U. ARK. LITTLE ROCK L. REV. 369, 370 (2003) ("Prior to 1981 putative fathers simply had no cause of action allowing them to seek a determination of paternity. Furthermore, the legal relationship between married parents and children born into the marriage was protected by a vigorous common law presumption that all such children were legitimate.") (citations omitted); Mills, *supra* note 31, at 617 (discussing that for much of our history unwed fathers were not afforded any right to participate in the decision to give their illegitimate children up for adoption).

38 *See* Armstrong, *supra* note 37, at 369–70 ("[T]he increased scientific certainty with which we can now determine biological paternity has actually decreased the moral certainty husbands can have in their legal status as father to the children born into the marital family.").

39 *Cf.* Armstrong, *supra* note 37, at 369–70 (discussing the relationship of DNA testing and putative fathers' legal rights).

40 It was not until the latter part of the twentieth century that parental rights were legally recognized in putative fathers. *See* Stanley v. Illinois, 405 U.S. 645 (1972); *see also* Armstrong, *supra* note 37, at 369–71 (discussing the impact of DNA testing on the legal rights of putative fathers).

41 405 U.S. 645 (1972).

42 *See supra* note 7.

imate children were thought to belong to no one.[43] By the end of the nineteenth century, society began to recognize the bond between a mother and her illegitimate child and the law eventually recognized an out-of-wedlock child as a member of the mother's family.[44] As the legal parent, mothers have a constitutionally protected right under the Fourteenth Amendment to make childbearing and childrearing decisions free from unnecessary government interference.[45]

While an unwed woman's parental rights became more strongly recognized under the U.S. Constitution, unwed fathers' rights have seemed to be diminished. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[46] the Supreme Court suggested that men—regard-

43 Karen Dwelle, *Adoption Without Consent: How Idaho is Treading on the Constitutional Rights of Unwed Fathers*, 39 IDAHO L. REV. 207, 209–10 (2002) (noting that under English common law, which carried over in the United States, illegitimate children were considered the children of no one and no legal rights were ascribed to unwed parents or their illegitimate child).

44 *See* Levy v. Louisiana, 391 U.S. 68, 71–72 (1968) (holding that illegitimate children cannot be denied rights, specifically the right to sue for their mother's wrongful death, recognized in other children); *see also* MARY ANN MASON, THE CUSTODY WARS 100–03 (1999); Mary Burbach & Mary Ann Lamanna, *The Moral Mother: Motherhood Discourse in Biological Father and Party Cases*, 2 J.L. & FAM. STUD. 153, 158 (2000) (recognizing that illegitimate children have inheritance rights through their mother's family).

45 *See* Quilloin v. Walcott, 434 U.S. 246, 249 (1978) ("[U]nless and until the child is legitimated, the mother is the only recognized parent and is given exclusive authority to exercise all parental prerogatives . . . ."); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (holding that the Fourteenth Amendment protects the right of "parents and guardians to direct the upbringing of children under their control"); *see also* Roe v. Wade, 410 U.S. 113 (1973) (holding that the Fourteenth Amendment protects a woman's right to an abortion); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as to the decision whether the bear or beget a child."); Martin R. Levy & Elaine C. Duncan, *The Impact of* Roe v. Wade *on Paternal Support Statutes: A Constitutional Analysis*, *in* FATHERS, HUSBANDS AND LOVERS: LEGAL RIGHTS AND RESPONSIBILITIES 115, 118 (Monroe L. Inker & Sanford N. Katz eds., 1979).

46 505 U.S. 833, 895 (1992). In *Casey*, the Court held that a state may not require a woman to obtain the consent of her husband before obtaining an abortion. *Id.*; *see also* Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003) ("The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, childrearing, and education."); Doe v. Smith, 486 U.S. 1308, 1309–10 (1988). In *Smith*, the Court denied a putative father's petition for an injunction to prevent his child's mother from obtaining an abortion based, in part, on the trial judge's conclusion that "'although the [putative father] has expressed a legitimate and apparently sincere interest in the unborn fetus, his interest would not be sufficient to outweigh the Constitutionally protected right of [the mother] to abort her child.'" *Id.* at 1309.

less of legal recognition of their parental rights or their marital status—have no constitutionally protected rights to participate in the abortion decision.[47] In striking down a Pennsylvania law requiring a husband's consent for an abortion, the court stated that "[t]he husband's interest in the life of the child [his wife is carrying does] not permit the State to empower him with this troubling degree of authority over his wife. . . . Women do not lose their constitutionally protected liberty when they marry."[48] Historically,

> [b]ecause the mother was the only person legally responsible for the child, most states required her consent to the adoption of a child born out of wedlock. The putative father was afforded no right to notice nor opportunity to be heard when the child's mother unilaterally decided to place their child for adoption. The putative father was legally powerless to prevent a court from terminating his parental rights.[49]

The Constitution does not protect putative fathers' rights regarding unborn children; therefore, states may individually determine the scope of a putative father's rights to participate in childbearing decisions—other than abortion—specifically, the decision to place their illegitimate child up for adoption.

The Supreme Court has recognized that the Fourteenth Amendment to the U.S. Constitution provides some protection of a putative father's rights in his children.[50] In 1972, the Court, in *Stanley*, held that under the Equal Protection and Due Process Clauses of the Fourteenth Amendment the state may not remove illegitimate children from the custody of their biological father without due process of the law.[51] In *Stanley*, Peter Stanley lived with his girlfriend for approximately eighteen years, and they raised their three children together.[52] When his girlfriend died, the state removed his children and placed them up for adoption without a hearing pursuant to an Illinois law declaring all single fathers to be unfit parents.[53] In contrast, Illinois law provided that married parents, divorced parents, and unwed mothers are entitled to a hearing to determine their fitness as parents before children could be removed by the state.[54] As an unwed father, Stanley was not permitted to participate in the adoption and was not

47 *Casey*, 505 U.S. at 895.
48 *Id.* at 898.
49 *See* Thompson, *supra* note 36, at 1477–78 (citations omitted).
50 *See supra* note 7.
51 Stanley v. Illinois, 405 U.S. 645 (1972).
52 *See id.* at 646.
53 *Id.* at 646–47.
54 *Id.* at 647.

entitled to a fitness hearing under Illinois law.[55] The Court held that the Illinois law was unconstitutional because Illinois could not remove Stanley's children from his custody without the fitness hearing the state extended to similarly situated parents.[56] According to the Court, "it follows that denying such a [fitness] hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause."[57] The Court's holding in *Stanley* seemed to overturn a century of law and practice that did not recognize parental rights in putative fathers. For the first time, the Court acknowledged that a father's parental rights in his illegitimate children were constitutionally protected under the Fourteenth Amendment.[58]

Six years later, however, in *Quilloin v. Walcott*, the Court made clear that the Constitution protected the parental rights of only a father who had exercised "actual or legal custody of his child."[59] In *Quilloin*, the Court upheld a Georgia statute that denied an unwed father the opportunity to prevent his child's adoption.[60] Leon Quilloin fathered a child with Ardell Williams, although the two were never married. When their child was three years old, Ardell married Randall Walcott. Eight years later, when the child turned eleven years of age, Walcott initiated adoption proceedings to become the child's legal father.[61] The Court held that in circumstances where the putative father has not "legitimized his offspring,"[62] the putative father's interests are sufficiently distinct from married parents to justify differ-

55 *Id.* at 648.

56 *Id.* at 658.

57 *Id.* (citation omitted).

58 *See* Ardis L. Campbell, Annotation, *Rights of Unwed Father to Obstruct Adoption of His Child by Withholding Consent*, 61 A.L.R. 5th 151 (1998) ("Prior to four landmark decisions of the Supreme Court of the United States in the 1970s and 1980s, the rights of unwed fathers to any determination regarding their children, particularly in the context of adoption, were curtailed by state laws . . . .").

59 Quilloin v. Walcott, 434 U.S. 246, 255 (1978). The *Quilloin* decision makes clear that the constitutional protection discussed in *Stanley* applies to biological fathers who, like Peter Stanley, had custody and participated in raising their children, although they never married the children's biological mother. *Id.*

60 *Id.* at 249 (citing GA. CODE ANN. § 74-403(3) (1975), which provided that "the consent of the mother alone shall suffice" to free the child for adoption).

61 *Id.* at 247.

62 *Id.* at 249. According to the Georgia statute at issue in the case, a child is legitimized when the father marries the child's mother or obtains a court order that declares the child is legitimate in the eyes of the law. *Id.*

ent treatment under state law.[63] Consequently, Georgia's law did not violate the Equal Protection Clause.[64]

Between 1978 and 1989, the Supreme Court revisited the putative father rights issue three more times.[65] These cases affirmed that legal recognition of a putative father's parental rights does not rest on biology.[66] In *Caban v. Mohammed*, for example, the Court held unconstitutional under the Equal Protection Clause a New York law that denied a putative father the right to contest the adoption of his illegitimate children.[67] Caban fathered two children with his girlfriend, Mohammed, while the two lived together.[68] Caban provided child support and participated in his children's lives before and after their birth.[69] After their relationship ended, Caban and Mohammed married other people.[70] Mohammed's new husband filed a petition to adopt her two children, and the Cabans counter-filed to adopt the two children.[71] Under New York law, a biological mother's consent was required before the biological father's family could adopt her child; a father's consent for a mother's adoption petition, however, was not required.[72] The Court held that the different treatment of parents in the New York law was unconstitutional under the Equal Protection Clause in cases like this, where both parents substantially participated in and contributed to their children's upbringing.[73] The decision, however, made clear that "in those cases where the father never has come forward to participate in the rearing of his child, nothing in the

63 *See id.* at 256 ("We think the appellant's interests are readily distinguishable from those of a separated or divorced father, and accordingly believe that the State could permissibly give appellant less veto authority than it provides to a married father."); *see also* Lehr v. Robertson, 463 U.S. 248, 267–68 (1983) ("If one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights.") (footnotes omitted).

64 *Quilloin*, 434 U.S at 256.

65 *See supra* note 7.

66 *See* Resnik, *supra* note 2, at 386 (reviewing the Supreme Court's putative father decisions and concluding, "[i]f the biological father was unable to establish himself as a part of his offspring's life, he could not claim a right to veto the child's adoption") (footnotes omitted).

67 441 U.S. 380 (1979).

68 *Id.* at 382.

69 *Id.*

70 *Id.* at 382–83.

71 *Id.* at 383.

72 *Id.* at 384.

73 *Id.* at 391–93.

Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child."[74]

The Supreme Court in *Lehr v. Robertson* reinforced the *Caban* holding.[75] In *Lehr*, Jonathon Lehr brought suit after the child's mother and her new husband adopted his illegitimate child.[76] Under New York law, fathers who sign up with the state's putative father registry are entitled to notice of adoption proceedings.[77] Lehr, who did not sign the registry, argued that the New York law violated his Due Process and Equal Protection rights under the Fourteenth Amendment by failing to provide him with adequate notice of his child's adoption.[78] Unlike Caban or Stanley, Lehr never lived with his child's mother and did not participate in or contribute to his child's upbringing.[79] The Court rejected Lehr's claim that biology "give[s] him an absolute right to notice and an opportunity to be heard before the child may be adopted,"[80] and held that New York's law did not violate the Fourteenth Amendment.[81] The Court stated,

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "acts as a father toward his children." But the mere existence of a biological link does not merit equivalent constitutional protection [to that afforded mothers].[82]

The *Stanley*, *Quilloin*, *Caban*, and *Lehr* cases demonstrate that only those putative fathers that participate in their children's upbringing benefit from constitutional protection of their parental rights. The Court's decisions in the putative father cases have been construed as creating a "Biology Plus Test"[83] for determining when putative fathers

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74 *Id.* at 392.

75 463 U.S. 248, 248 (1983).

76 *Id.* at 250.

77 *Id.* at 251.

78 *Id.* at 253–55.

79 *Id.* at 252.

80 *Id.* at 250.

81 *See id.* at 261, 267–68.

82 *Id.* at 261 (citations omitted).

83 Resnik, *supra* note 2, at 385:

> An unwed father does not receive constitutionally protected rights by merely conceiving a child with a woman. In order to trigger the protection of the Constitution the unwed father must establish a positive and substantial relationship with his child. Only then does he gain the right to veto his child's adoption.

Id.

have constitutionally protected rights. The "Biology Plus Test" requires "an unwed father [to] demonstrat[e] a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child.'"[84] Absent that commitment, putative fathers have no constitutionally protected rights in their children and, therefore, they are not entitled to notice of their child's adoption.[85]

After the Supreme Court's decision in *Lehr*, it seemed settled that an unwed father who had established a relationship with his child would be guaranteed a voice in adoption proceedings.[86] Six years after *Lehr*, the Supreme Court, in *Michael H. v. Gerald D.*,[87] again considered the scope of the putative father's rights. After *Michael H.*, even those putative fathers who satisfy the "Biology Plus Test" may not be entitled to constitutional protection of their parental rights.[88]

In *Michael H.*, Carole, separated from her husband, began a sporadic extramarital affair with Michael H. that resulted in an illegitimate child.[89] Michael H. participated in the child's upbringing from the time of her birth.[90] Eventually, Carole and Michael's relationship soured and Carole reunited with her estranged husband, Gerald D. After Michael and Carole's relationship ended, Michael sought court ordered visitation rights with their daughter. Gerald D. asserted that Michael had no visitation right under California law, which recognized the husband as the legal father of any child in the marriage, unless it is established that the husband was impotent or sterile at the

84 *Lehr*, 463 U.S. at 261 (quoting Caban v. Mohammed, 441 U.S. 380, 392 (1979)).

85 *See id.* at 265; *see also* Resnik, *supra* note 2, at 385.

86 The Supreme Court has not elaborated on the type of relationship that is required to establish a constitutionally protected relationship between an unmarried man and his biological children. Instead, the Court has offered generalities. For example, in *Lehr* the Court held that the putative father must "act as a father toward his children" and "accept[ ] some measure of responsibility for the child's future." *Lehr*, 463 U.S. at 261–62 (quoting Caban v. Mohammed, 441 U.S. 380, 389 n.7 (1979)). *See generally* Chow, *supra* note 8, at 355 ("Generally, the Court seemed to hold that parental rights stem more from the nature of a father-child relationship than from biological ties.").

87 491 U.S. 110 (1989).

88 *Id.* (holding that a putative father who provided emotional and financial support to his biological child did not have legally recognized parental rights because the law recognized the biological mother's husband as the child's father).

89 *Id.* at 113.

90 Michael publicly acknowledged that he was the child's father and provided the child with financial and emotional support. While Michael and Carole were in a relationship, they shared custody of their daughter. *See id.* at 114; *see also id.* at 159 (White, J., dissenting).

time of conception.[91] Gerald argued that because he was not impotent or sterile, he, as Carole's husband, was the child's legal father.[92] Consequently, Michael had no legally recognized rights to his child. The validity of this law eventually came before the Supreme Court. Despite the Court's earlier decisions in *Stanley*, *Quilloin*, and *Caban* recognizing constitutionally protected parental rights to unwed fathers that satisfied the "Biology Plus Test," the Court upheld the California law and refused to recognize Michael H.'s paternal rights.[93] Relying on the common law presumption of legitimacy for children born within a marital relationship, the Court held that Michael had no constitutionally protected interest in his child[94] and that the Equal Protection Clause is not a barrier to states extending preferential treatment to married men in determining parental rights.[95]

The Supreme Court's decision in *Michael H.* did not abrogate the "Biology Plus Test," which courts continue to apply in cases that involve paternity of the children of unmarried mothers.[96] The *Michael H.* case underscores that biology is only one factor in determining when a putative father benefits from constitutional protection of his parental rights.[97] According to one commentator, the lesson of the *Stanley*, *Quilloin*, *Caban*, *Lehr*, and *Michael H.* cases is that "an unwed father has a constitutionally protected right to establish a relationship with his child *if* the biological mother decides to give birth to the child *and* is not married to another man, *and* if he does not delay assuming his parental role."[98]

By denying certiorari in the high-profile contested adoption cases involving Baby Emily, Baby Jessica, and Baby Richard, the Supreme Court has indicated that it is not interested in exploring this issue further.[99] States, in an effort to recognize some parental rights in putative fathers, are left to balance the relatively undefined constitu-

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91 *Id.* at 115.

92 *Id.*

93 *Id.* at 118–32.

94 *Id.* at 127.

95 *Id.* at 129–30.

96 *See* Resnik, *supra* note 2, at 388.

97 *See* Emily Buss, *"Parental" Rights*, 88 VA. L. REV. 635, 661 (2002).

98 Toni L. Craig, *Establishing the Biological Rights Doctrine to Protect Unwed Fathers in Contested Adoptions*, 25 FLA. ST. U. L. REV. 391, 403 (1998) (emphasis added); *see also* Buss, *supra* note 97, at 661 (pointing out that the presence of constitutional protection of a putative father's rights to his children varies depending on the context).

99 *See* Resnik, *supra* note 2, at 389.

tional rights of biological fathers with the more clearly defined constitutional rights of biological mothers.[100]

States have found it particularly challenging to balance the rights of biological parents in cases involving newborn adoptions. The Supreme Court has not confronted the constitutional status of putative fathers' rights in newborns and its "Biology Plus Test" has minimal, if any, application in newborn adoption cases.[101] By eliminating the common law's absolute rule that unwed fathers have no rights to their illegitimate children, the Supreme Court has provided a legally cognizable basis for putative fathers to contest adoption proceedings.[102]

Florida's Baby Emily case illustrates this and the need for state action to clarify the scope of unwed father's rights.[103] In 1992, Mr. and Mrs. Walsh began adoption proceedings for newborn Baby Emily. The baby's biological father, however, contested the adoption. Although the Walshes loved and cared for the baby as their own, it took three years and several court battles to complete the adoption and provide legal recognition and protection of their family unit.

Baby Emily, as she was later known in the press, was three days old when the Walshes brought her home.[104] Her biological mother, a single woman, decided early in her pregnancy to place Baby Emily up for adoption. Baby Emily's biological father, Gary, was in a relationship with Baby Emily's mother during her pregnancy; however, he was not emotionally or financially supportive of his girlfriend's pregnancy.[105] Although Gary showed little interest in his unborn child, when he received notice of Baby Emily's pending adoption, he refused to relinquish his parental rights and notified the Walshes that

100 *See* Chow, *supra* note 8, at 349 (describing the various interests that adoption laws attempt to take into consideration). *See generally* Mills, *supra* note 31 (discussing the ways that states have tried to address the competing and conflicting interests involved in adoption proceedings).

101 Resnik, *supra* note 2, at 389. Many courts and state legislatures are hesitant to apply the "Biology Plus Test" to cases involving paternal rights of newborns because it, ultimately, is a measure of the father's relationship with the child's mother. For a description of the "Biology Plus Test," see *supra* note 83. See *infra* note 110 for a discussion of the problems in applying the "Biology Plus Test" to cases involving newborns.

102 *See* Campbell, *supra* note 58, at 151 ("Following the Supreme Court decisions . . . unwed fathers have widely challenged . . . the termination of their parental rights in order to permit an adoption.").

103 G.W.B. v. J.S.W. (*In re* Adoption of E.A.W.), 658 So. 2d 961 (Fla. 1999); *see* Resnik, *supra* note 2, at 390.

104 *See* Craig, *supra* note 98, at 393.

105 *G.W.B.*, 658 So. 2d at 964.

he would seek custody.[106] Florida law requires the consent of certain biological fathers, unless there is proof of abandonment.[107] Evidence of abandonment severs parental rights.[108] Three years after Emily's birth, the case went to the Florida Supreme Court.[109] The court, holding in favor of Baby Emily's adoptive parents, determined that Gary's lack of emotional support for Emily's biological mother was sufficient to establish abandonment.[110] The Walshes, therefore, did not need Gary's consent of their adoption of Emily.

Although the Florida Supreme Court's decision in the Baby Emily case was decided on state law grounds, the case demonstrates the difficulties presented by the Supreme Court's line of decisions in *Stanley*, *Quilloin*, *Caban*, *Lehr*, and *Michael H.* The U.S. Supreme Court has not considered a case involving a putative father's rights concerning his newborn child; therefore, Florida may define putative father's rights in newborns as it sees fit. Florida law provides that a known biological father is entitled to withhold adoption consent unless he has been found by a Florida court to have abandoned the child.[111] Similar to the Supreme Court's "Biology Plus Test," abandonment can be established by evidence that the biological father has failed to provide emotional and financial support of the mother during her pregnancy.[112] A problem with this method of establishing a putative father's parental rights is that it makes the father's parental rights contingent on his relationship with the child's mother—a woman he may not know is pregnant, that he may not be capable of providing financial or emotional support for, that he may have a bad relationship with, or that he may not have any relationship with at all.[113]

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106 *Id.* at 964–65.

107 FLA. STAT. ANN. § 63.062(1) (West 1997 & Supp. 2004). Florida law requires the consent of all men who were married to the mother at the time of the child's conception or birth, have been established as the father though paternity testing or court proceedings, or who the mother has identified as a possible father. *Id.*

108 *Id.*

109 *G.W.B.*, 658 So. 2d at 961.

110 *Id.* at 967. Many courts have adopted the Supreme Court's "Biology Plus Test" in cases involving newborn adoptions. For a description of the test, see *supra* note 83. In newborn adoptions, the "plus" is evaluated by the putative father's level of emotional and financial support of the biological mother during her pregnancy. *See* Resnik, *supra* note 2, at 394–99.

111 FLA. STAT. ANN. § 63.064(1) (West 1997 & Supp. 2004).

112 *G.W.B.*, 658 So. 2d at 967 (finding that the biological father had abandoned his unborn child where he provided no financial or emotional support for the mother or the child and showed little interest in either the mother or the unborn child).

113 *See* Craig, *supra* note 98, at 394–423 (advocating for a "biological rights doctrine" to replace the "Biology Plus Test" because of the problems associated with making a man's paternal rights dependent on his relationship with the child's mother);

The solution provided by Florida's 2001 Adoption Act to the problems posed by imprecise legal standards like the "Biology Plus Test" was to extend the right to notice and, therefore, the right to withhold consent for adoption, to all potential biological fathers. The Supreme Court's decisions in *Stanley*, *Quilloin*, *Caban*, *Lehr*, and *Michael H.* suggest that states may decide how and when to recognize putative fathers' rights in their newborn children. It is important to note, however, that the "hazy boundaries [set by the Supreme Court's putative father cases] do not justify pushing the edges of those boundaries to the point of trampling constitutional rights."[114] Unfortunately, Florida's 2001 Adoption Act effort to vest putative fathers of newborns with legally recognized parental rights has trampled biological mothers' constitutional rights.

III. First Amendment Analysis

Florida's 2001 Adoption Act was intended to clarify the biological mothers' and fathers' rights to avoid contested adoption cases like Baby Emily's.[115] Opponents of the 2001 Adoption Act assert that the law's notice requirement violates the mother's state constitutionally protected right to privacy.[116] Although the plaintiffs also asserted that the law violated the U.S. Constitution's protection of privacy,[117] the Florida Appeals Court invalidated the law on state constitutional grounds.[118] Generally, adoption laws that compromise the biological mother's privacy[119] have withstood challenges brought under the Fourteenth Amendment of the U.S. Constitution.[120]

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see also Chow, *supra* note 8, at 369–70 (arguing in favor of putative father registries because they allow putative fathers to assert their rights independently of a relationship with or the cooperation of the child's mother).

114 Dwelle, *supra* note 43, at 226.

115 *See* Hodes, *supra* note 17 (citing the Baby Emily case as the primary reason the state legislature worked to amend Florida's adoption laws); *see also* Senate Staff Analysis, *supra* note 3, at 2 (citing the high-profile contested adoption cases of Baby Emily, Baby Jessica, and Baby Richard as an impetus for the revision of Florida's adoption laws).

116 Fla. Const. art. I, § 23.

117 U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of . . . liberty . . . without due process of law."); *see also* Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing that the U.S. Constitution protects the right to privacy).

118 For a discussion of the appeals court decision, see *supra* text accompanying notes 25–27.

119 For example, laws requiring the mother to reveal the identity of the father to the state have been upheld against constitutional challenges. *See infra* note 120.

120 *See* Jerome Barron, *Notice to the Unwed Father and Termination of Parental Rights: Implementing* Stanley v. Illinois, *in* Fathers, Husbands and Lovers: Legal Rights and

The Fourteenth Amendment protects mothers' and fathers' (who satisfy the "Biology Plus Test") parental rights;[121] however, it also protects individuals' speech rights from unwarranted intrusions by the state.[122] The 2001 Adoption Act implicates the right to freedom of speech in the First Amendment by forcing mothers to reveal information they prefer remain private.

According to the Supreme Court, "the right of freedom . . . protected by the First Amendment against state action includes both the right to speak freely *and the right to refrain from speaking at all.*"[123] Compelled speech challenges have arisen when states have required students to recite the Pledge of Allegiance,[124] drivers to display the state motto on their license plate,[125] newspapers to print responses to editorial criticisms from political candidates,[126] and charities to disclose to potential donors the percentage of contributions that will actually be dedicated to the charitable purpose.[127] In all of these cases, the U.S. Supreme Court held that state laws compelling speech violated the speaker's freedom of speech by requiring speech that the speaker would not ordinarily express.

In *West Virginia State Board of Education v. Barnette,* the Court first enunciated the compelled speech doctrine.[128] In *Barnette,* a group of Jehovah's Witness challenged the West Virginia State Board of Education's decision to require students to recite the Pledge of Allegiance each day before school started. Students who refused to recite the Pledge could be expelled from school.[129] The Supreme Court, holding that the school board's mandate violated the students' free speech right, said that the First Amendment stands for the proposition that

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RESPONSIBILITIES, *supra* note 45, at 95, 107. An analysis of the Fourteenth Amendment arguments in these cases is beyond the scope of this Note.

121 *See supra* Part II.

122 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336 n.1 (1995) ("[T]he term 'liberty' in the Fourteenth Amendment to the Constitution makes the First Amendment applicable to the States.").

123 Wooley v. Maynard, 430 U.S. 705, 714 (1977) (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633–34 (1943)) (emphasis added); *see also* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796–97 (1988) ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say.").

124 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

125 *Wooley,* 430 U.S. at 714.

126 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

127 *Riley,* 487 U.S. at 784.

128 *Barnette,* 319 U.S. at 642.

129 *Id.* at 626–29.

individuals are free to express their beliefs.[130] It would be inconsistent with this underlying principle of the First Amendment to allow the government to force individuals to express ideas that are contrary to their beliefs.[131] The compelled speech doctrine reflects the notion that the First Amendment not only encourages the "marketplace of ideas," but also protects individual autonomy and freedom of thought and belief.[132]

Before 1988, all of the Supreme Court's decisions invalidating laws based on the compelled speech doctrine involved government mandated expressions of opinions or beliefs.[133] In 1988, the Court, in *Riley v. National Federation of the Blind of North Carolina*,[134] held that the First Amendment protects against government mandated disclosure of facts, in addition to mandated disclosure of opinions. At the center of the *Riley* case was a North Carolina law that required fundraisers for charitable organizations to disclose to all potential donors the average percentage of donations actually contributed to the charities.[135] In evaluating the First Amendment claim, the Supreme Court subjected the law to the highest scrutiny, placing a significant burden of proof on the state to show that the law was narrowly tailored to serve a compelling government interest.[136] This level of scrutiny, strict scrutiny, is reserved for content-based regulations of speech. According to the Supreme Court in *Riley*, strict scrutiny was warranted in the case because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech."[137] In *Riley*, the court declared that North Carolina's required disclosure of information related to charitable fundraising is a content-based restriction[138] and

130 *Id.* at 634.

131 *Id.*

132 *See* Anna M. Taruschio, *The First Amendment, The Right Not to Speak and the Problem of Government Access Statutes*, 27 FORDHAM URB. L.J. 1001, 1005–07 (2000) (arguing that the Court's decisions regarding speech restrictions and compelled speech can be understood as reflecting two values embodied in the First Amendment—the need for a "marketplace of ideas" in a democracy and protecting individual beliefs and autonomy from undue government influence).

133 *See supra* notes 123–26 and accompanying text.

134 487 U.S. 781, 797–98 (1988) (referring to the Court's previous compelled speech decisions, the Supreme Court said that "[t]hese cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech").

135 *Id.* at 786. The law also required that the fundraiser disclose his/her name and the name of the professional fundraiser by whom he/she was employed. *Id.*

136 *Id.* at 798.

137 *Id.* at 795.

138 *Id.* at 798.

that the First Amendment prohibits "government [from] dictat[ing] the content of speech absent compelling necessity, and then, only by means precisely tailored."[139] The Court acknowledged that the state had an interest in informing potential donors of the percentage of their contribution that would actually go to the charity; however, the court did not accept that the state's interest rose to the level of "compelling."[140] The North Carolina law also failed the narrow tailoring requirement.[141] The Supreme Court noted that the state could have achieved its purpose by disclosing information from the financial forms professional fundraisers are required to submit to the state.[142] State disclosure would serve to provide information to potential donors without requiring fundraisers to disclose information against their will.[143] North Carolina failed to meet its burden and the Supreme Court declared the disclosure law unconstitutional under the First Amendment.

Similar to the law at issue in *Riley*, Florida's 2001 Adoption Act requires the disclosure of specific and detailed information[144] that the speaker would not disclose absent the government mandate.[145] The Supreme Court established in *Riley* that the compelled disclosure of facts is a content-based regulation of speech that invokes the highest level of review under the First Amendment.[146]

Using the analysis in *Riley*, the 2001 Adoption Act must be narrowly tailored to serve a compelling government interest to withstand constitutional review.[147] The 2001 Adoption Act fails on both counts. Unlike mothers, who have a constitutional right to make childbearing and childrearing decisions,[148] the Supreme Court has held that putative fathers who fail the "Biology Plus Test" have no constitutionally

139 *Id.* at 800.

140 *Id.* at 798 ("[T]he danger the state posits is not as great as might initially appear.").

141 *Id.* at 800.

142 *Id.*

143 *See id.*

144 *See supra* note 13 and accompanying text.

145 Statistics show that adoptions decreased in the first six months after the law took effect. *See* Pollitt, *supra* note 16. Charlotte Dancui, the attorney that brought the trial court case, alleged that many women refused to pursue a private adoption after learning of the notice requirement. *See* Shana Gruskin, *Statute Causes More Abortions, Lawyer Says*, S. FLA. SUN-SENTINEL, Nov. 15, 2002, at 4B.

146 *See supra* notes 134–43 and accompanying text.

147 *Riley*, 487 U.S. at 800.

148 *See supra* notes 43–48 and accompanying text.

protected parental rights.[149] The Constitution, therefore, does not provide a justification for requiring that all putative fathers receive constructive notice of adoption proceedings involving their children.

The Palm Beach County Circuit Court, in the first case considering the Florida Adoption Act, identified several compelling government interests to justify the law against the state constitutional right to privacy challenge.[150] According to the court, the state has compelling interests in strengthening and maintaining the parent/child bond, establishing parental rights as quickly as possible, and decreasing the state's burden to support the child (if the biological father can be located and is willing and able to provide support).[151] The text of the 2001 Adoption Act provides another important, if not compelling, state interest: to promote a stable and permanent family life for children and their biological and adoptive parents.[152] The Florida Court of Appeals, however, rejected the trial court's finding that the state successfully asserted a compelling government interest.[153] According to the court, "the state has failed to demonstrate . . . how any compelling interest of either the putative father or the state outweighs the privacy rights of the mother and child in not being identified in such a personal, intimate, and intrusive manner."[154] Additionally, the failure of the state to appear in court in defense of its law may reflect the absence of a state interest sufficient to justify the law.

Even if the Palm Beach County Circuit Court correctly identified a compelling state interest, the law fails the "narrow tailoring" requirement. According to the Supreme Court, "even though the governmental purpose [is] legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[155] In *Riley*, the Supreme Court evaluated the "tailoring" of the law in view of alterna-

149 *See* Lehr v. Robertson, 463 U.S. 248, 261 (1983) (stating that the substantial due process protection attaches only "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child'") (citation omitted).

150 Hodes, *supra* note 17.

151 *Id.*

152 FLA. STAT. ANN. § 63.022(2)(a) (West Supp. 2003); *see also* Mills, *supra* note 31, at 616 (suggesting the state's interests is in quickly freeing a newborn for adoption to ensure a stable family unit for the child).

153 G.P. v. State, 842 So. 2d 1059, 1063 (Fla. Dist. Ct. App. 2003).

154 *Id.*

155 Wooley v. Maynard, 430 U.S. 705, 716–17 (1977).

tive means of accomplishing the same state objectives.[156] Instead of the explicit and intrusive notice requirement in the 2001 Adoption Act, the state's goals could be met by implementing a putative father registry.[157] Putative father registries allow the biological father to assert his paternal rights independently from his relationship with the biological mother.[158] Putative father registries also allow states to serve their interests of reducing the state burden of supporting illegitimate children, strengthening parent-child bonds, and clarifying parental rights to attain a stable family environment for the child early in adoption proceedings. The task of establishing parental rights lies solely with the biological father, and only with those fathers who wish to exercise their parental rights. In comparison, the 2001 Adoption Act burdens a biological mother seeking an adoption from private agencies,[159] and all of the men she has had sex with in the twelve months before giving birth.[160] While the information in the putative father registry is confidential, the 2001 Adoption Act requires women to publicly expose all men she has had sex with during the previous year. Putative father registries are a less intrusive, and probably more successful,[161] way for Florida to achieve its interests.

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156 Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 800 (1988); *see also Wooley*, 430 U.S. at 716–17 ("The breadth of legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose.").

157 Florida did, in fact, consider creating a putative father registry when drafting the 2001 Adoption Act, but instead decided to enact the expanded notice requirements. Some members of the Florida Legislature criticized putative father registries as "zipper down" measures because they unreasonably require interested fathers to register every time they "unzip their pants." McDonough, *supra* note 14. Interestingly, when the 2001 Adoption Act was repealed in April 2003, it was replaced with a putative father registry. *See supra* note 28 and accompanying text.

158 Putative father registries create a presumption of parental rights, thus reducing the necessity for tests like "Biology Plus." *Cf.* Craig, *supra* note 98, at 436 (describing the model putative father registry—the "Statute Clarifying the Rights of Unwed Fathers in Newborn Adoptions"—as creating a presumption of legitimacy).

159 The disclosure requirement only applied to women who sought private adoptions. The most plausible explanation for the different treatment of public and private adoptions is that the state did not want to bear the costs for placing the ad. *See* Pollitt, *supra* note 16.

160 The Florida law requires that when the identity of the biological father is unknown, the biological mother must include in the notice the names or descriptions of every man she slept within the twelve months preceding the child's birth. *See* FLA. STAT. ANN. § 63.089 (West Supp. 2003); *see also* Dahlburg, *supra* note 16 ("This [act] is . . . an intrusion of a woman's privacy and the privacy of the men who were involved with her . . . . and the men named in the newspaper may not even be the father.").

161 Some commentators have questioned the ability of constructive notice to alert any biological fathers of adoption proceedings involving their illegitimate children. *See, e.g.*, Dahlburg, *supra* note 16 (quoting adoption lawyer Charlotte Dancui, "the

In light of "a less drastic means for achieving the same purpose,"[162] the 2001 Florida Adoption Act fails the "narrow tailoring" requirement of strict scrutiny review. Based on the *Riley* decision, the 2001 Florida Adoption Act is unconstitutional under the compelled speech doctrine of the First Amendment.

IV. Policy Implications of the 2001 Adoption Act

Regardless of whether the 2001 Adoption Act violates individual state constitutions or the U.S. Constitution, it is not good policy and should not be implemented in other states. In the first six months after the act's implementation, 2000 more abortions were performed in Florida than in the previous year.[163] The 2001 Adoption Act's opponents assert that the increase in abortions is an inevitable consequence of the expanded notice requirement, as women will want to avoid public exposure of their private activities.[164]

Furthermore, the law increased the burden on prospective adoptive parents by significantly increasing the costs of adoptions[165] and made adoptive parents more hesitant to adopt out of concern about the effect the notice requirement would have on biological mothers.[166] Consequently, the number of adoptions in Florida decreased after the law took effect.[167]

Finally, as of September 2002, one year after the law was implemented, no biological fathers had sought to assert parental rights in response to the ads.[168] Given these statistics, the 2001 Adoption Act seems to have failed at advancing the state's interest in strengthening

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men named in the newspaper may not even be the father"); *see also* Chow, *supra* note 8, at 369–70 ("In states with a putative father registry, however, as long as an unwed father timely signs the registry, he will receive notice and the right to consent to the adoption of his child.").

162 Wooley v. Maynard, 430 U.S. 705, 716–17 (1977).

163 *See* Gruskin, *supra* note 145.

164 *See id.*; Pollitt, *supra* note 16.

165 Adoption costs the prospective adoptive parents between $15,000 to $25,000. *See* H & R Block, *Consumer Tips—Can Couples Afford to Adopt, at* http://www.hrblock.com/video_transcripts/afford_adoption.html (last visited Nov. 21, 2003). The ads can increase the costs to adoptive parents by as much as $10,000. *See* McDonough, *supra* note 14.

166 *See, e.g.*, Cheakalos, *supra* note 16, at 217 (reporting the story of one foster family that abandoned their effort to adopt their foster child because they were concerned about the impact of the 2001 Florida Adoption Act on the child's mother).

167 *See* Pollitt, *supra* note 16; *see also* Hilpern, *supra* note 13 ("The Brandon Crisis Center is not untypical in reporting that the number of women who agree to put their child up for adoption has dropped more than 20 percent this year.").

168 *See* Cheakalos, *supra* note 16, at 218.

parent-child bonds, identifying biological fathers early in the process, and clarifying parental rights to attain a stable family environment for the child early in adoption proceedings.[169] This may be why the state legislature amended the law shortly after resuming the legislative session in March 2003. Other states that wish to provide additional protections for putative fathers' legal rights should learn from Florida's failed experiment with the 2001 Adoption Act. The act, intended to promote fathers' rights and avoid ugly adoption battles like that over Baby Emily, has led to increased abortions and decreased adoptions. As Florida Governor Jeb Bush pointed out, "we should be making adoption easier, not more difficult, and not stigmatizing women who are trying to do the right thing."[170]

CONCLUSION

Under the Supreme Court's decision in *Riley*, the 2001 Adoption Act, now repealed, violated the First Amendment's prohibition on compelled speech by requiring that specific personal information be printed in newspapers before children can be placed up for adoption. Constitutional issues aside, the 2001 Adoption Act was bad policy. For states engaged in their own efforts to balance putative fathers' interests with the interests of biological mothers and prospective adoptive parents, Florida's experience demonstrates that expanded notice requirements are not the answer.

The Florida Legislature wisely implemented a state putative father registry, already in existence in thirty states.[171] Putative father registries provide rights to those men who wish to care for their children without making their rights dependent on their relationship with the biological mother, and without invading either biological parent's right to privacy concerning their sex lives.

169 *See* Dahlburg, *supra* note 16.

170 *Id.*

171 *See* Pollitt, *supra* note 16.